

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTONIO C. SIMONELLI,

No. C 02-1107 JL

Plaintiff,

v.

UNIVERSITY OF CALIFORNIA -
BERKELEY, ET AL.,

Defendants.

**ORDER DENYING PLAINTIFF'S
MOTION FOR NEW TRIAL (Docket #
254) and MOTION FOR ATTORNEY
FEES (Docket # 251)**

Introduction

Plaintiff Antonio C. Simonelli's motions for a new trial and for attorney's fees came on for hearing. Christopher H. Katzenbach, KATZENBACH & KHTIKIAN, appeared for Plaintiff. Michael Bruno, GORDON & REES, appeared for Defendant. The Court considered the moving and opposing papers and the arguments of counsel and hereby denies both motions.

Factual Background

Plaintiff Antonio Simonelli has been diagnosed with cerebral palsy, a result of his premature birth. His most significant physical problem is very low vision. Specifically, he has severe strabismus or nearsightedness, only partly correctable with contact lenses, and nystagmus, a tendency of his eyes to stray out of alignment, affecting their ability to focus, and his ability to read. He is intelligent and ambitious, and graduated with honors from the University of California Berkeley, and in the upper third of his class at UC Berkeley's Boalt

1 Hall School of Law. He commenced law school at Boalt in Fall 2000 and graduated in May
2 2005.

3 He is and was while a student at Boalt a person with a disability within the meaning
4 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 705(20)) and the Americans
5 with Disabilities Act (42 U.S.C. § 12102(2)). He is and was also a handicapped person
6 within the meaning of the Federal Regulations issued under the Rehabilitation Act at 34
7 C.F.R. and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §§ 705(2)), 794). All
8 parties agree that Simonelli is and was while a student at Boalt a qualified individual with a
9 disability within the meaning of section 101(8) of the Americans with Disabilities Act (42
10 U.S.C. § 12111(8)) and a qualified handicapped person within the meaning of the Federal
11 Regulations issued under the Rehabilitation Act at 34 C.F.R. Part 104.

12 Defendant the University of California Berkeley ("UC") is and has been continuously
13 since at least August 2000 a recipient of Federal financial assistance within the meaning of
14 section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), as well as a public entity
15 within the meaning of section 201(1) of the Americans with Disabilities Act (42 U.S.C. §
16 12131 (1)), and is subject to the federal regulations issued by the Department of Education
17 set forth in 34 C.F.R. Part 104 and by the Department of Justice set forth in 28 C.F.R. Part
18 35.

19 Simonelli obtained his Bachelor of Arts degree from UC in May 2000. Before
20 Simonelli's law school classes began, he requested accommodations from Boalt. Ward
21 Newmeyer, ADA Compliance Officer for the University, conducted an investigation to
22 determine the proper accommodation for Simonelli.

23 On March 24, 2004 Simonelli was injured in an automobile accident and was unable
24 to attend the remainder of his classes for the Spring 2004 semester. Simonelli took his
25 Spring 2004 exams after the original exam date because of those injuries. He took his final
26 examinations after the original exam dates in every semester until Spring 2003.

27 Both sides agree that Simonelli received all of his course materials on time and in
28 the correct format from the spring 2003 semester on. (Joint Statement of Undisputed

1 Material Facts, filed by Antonio Simonelli on August 31, 2007, modified September 4, 2007;
2 Docket #159)

3 **Procedural Background**

4 This Court has original jurisdiction pursuant to Section 504 of the Rehabilitation Act
5 of 1973 (29 U.S.C. § 794), and the Americans With Disabilities Act of 1990 ("ADA") (42
6 U.S.C. § 12101 et seq.), and supplemental jurisdiction over claims for violation of the Unruh
7 Civil Rights Act (California Civil Code §§ 51, 52), (b).

8 Simonelli filed his complaint in March 2002 while a student at Boalt Hall School of
9 Law of the University of California at Berkeley. Two months later he filed an application for
10 a temporary restraining order ("TRO") and for a preliminary injunction. The district court
11 (Hon. Charles R. Breyer) referred the parties for a settlement conference before a
12 magistrate judge (Hon. Maria-Elena James). They were not able to resolve their dispute.
13 Simonelli renewed his motion for a TRO. The district court denied the motion and referred
14 the parties back to the magistrate judge for a further settlement conference.

15 The parties continued settlement negotiations. By May 2003 they had reached an
16 interim agreement. The magistrate judge issued a series of orders to both sides regarding
17 compliance with the interim agreement.

18 In August 2003 Simonelli filed an application for a new TRO to permit him to
19 participate for a second time in the interview process for summer law firm employment.
20 Judge Breyer denied the application.

21 On August 24, 2004, Simonelli advised Judge Breyer that:

22 "Magistrate Judge James has conducted settlement conferences with the parties.
23 As a result of these conferences, the parties have reached a settlement as to
24 accommodation of plaintiff's disability and a schedule for plaintiff to complete his law
25 school studies. The parties will be conducting a further settlement conference with
26 Judge James in October or November to resolve issues of damages and attorney
27 fees."

28 The parties participated in a number of case management conferences and
settlement conferences but advised the court over a year later on October 3, 2005 that they
were unable to settle and the case should be set for trial or dispositive motions.

1 In January 2006 all parties consented to reassignment to this Court for all further
2 proceedings. The case was scheduled for case management conference in May 2006. The
3 parties stipulated to continue the case management conference to October and the
4 discovery cut-off to the end of December 2006.

5 The parties submitted to the Court several status reports regarding discovery issues,
6 but were able to resolve them without intervention. They agreed that they could not
7 complete discovery by the end of December 2006. The Court extended the discovery cut-
8 off to May 31, 2007. In December, the Court set a further case management conference for
9 April 2007 and ordered the parties to file any cross-motions for summary judgment by July
10 31, 2007.

11 In March 2007 Gordon and Rees substituted as counsel for Lafayette and Kumagai
12 for all Defendants. At the case management conference in April 2007 the Court set a trial
13 date of November 5, 2007 and ordered Simonelli to file a motion for summary judgment by
14 August 31. The discovery cut-off was extended to July 27. The parties had a number of
15 discovery disputes over the course of the summer, which the Court resolved.

16 In August the parties stipulated to the dismissal without prejudice of Plaintiff's First
17 Claim for Relief for failure to accommodate Plaintiff's disability and Plaintiff's Third Claim for
18 Relief for discrimination pursuant to 42 U.S.C. §1983 against Defendants Dwyer,
19 Newmeyer and Ortiz. A settlement conference was held on September 10, 2007, but
20 terminated after thirty minutes.

21 The Court set dates for jury trial and for a pretrial conference at which motions would
22 be heard.

23 The parties filed dozens of pre-trial motions. They objected to each others' proposed
24 discovery excerpts, exhibits, witnesses, jury instructions and voir dire. The Court ruled on
25 most of these motions at the pretrial conference October 24, 2007. Only a few rulings are
26 relevant to Simonelli's motion for new trial:

27

28

1 The Court denied without prejudice Defendants' motion to exclude references to
2 prior settlement agreements, but with the limitation that neither party was to refer to the
3 process as a "settlement" or "settlement conference" or the agreement as a "settlement
4 agreement." The Court ruled that the evidence was admissible to outline the chronology of
5 the case, but would not be allowed on the issue of liability. The Court left the subject open
6 to a possible limiting instruction at the end of the case, as needed.

7 The Court denied Simonelli's motion to exclude evidence of alternative
8 accommodations offered to Simonelli in law school and of Simonelli's undergraduate
9 accommodations.

10 The Court denied without prejudice Simonelli's motion to exclude the expert
11 testimony of Dr. Lipian, but warned that Dr. Lipian was strictly limited to testifying about
12 malingering as within his expertise in reference to the DSM-IV. Dr. Lipian was not to testify
13 as to the general truthfulness or credibility of Plaintiff.

14 The Court overruled without prejudice Simonelli's objection to any testimony by
15 witness Angelika Leventhal.

16 Simonelli had meanwhile filed a motion for partial summary judgment, based on
17 three propositions: that the University violated its duty to accommodate him; that the
18 University's actions constituted "deliberate indifference" to his federally protected rights;
19 and that he was entitled to compensation for lost salary because the University's failure to
20 accommodate him delayed his graduation and prevented him from obtaining employment
21 as a lawyer.

22 The Court denied Plaintiff's motion for partial summary judgment on November 1,
23 2007. The Court held that Simonelli had failed to meet his burden to show that there was
24 no genuine issue of material fact that the University violated its duty to accommodate him,
25 that the University's actions constituted "deliberate indifference" to his federally protected
26 rights, and that he is entitled to lost salary due to the University's failure to accommodate
27 him and the consequent delay of his graduation preventing him from obtaining employment
28 as a lawyer. The case went to jury trial November 5.

1 After the close of evidence, the Court dismissed the individual defendants, Deans
2 John Dwyer and Victoria Ortiz, in response to Defendants' Motion for Judgment as a Matter
3 of Law. After viewing all the evidence in the light most favorable to Simonelli, the Court was
4 compelled to find that he had failed to establish a *prima facie* case that either Dwyer or
5 Ortiz intentionally or unintentionally discriminated against him on the basis of his disability
6 in violation of the California Unruh Civil Rights Act, Cal. Civ. Code §51 et seq. (Order at
7 Docket # 243)

8 After closing arguments and jury instructions, and two hours of deliberations, the jury
9 returned a special verdict for the University. On the four-page, nine-question Verdict Form,
10 the jury answered only Question 1:

11 "1. Do you find that the University excluded Mr. Simonelli from
12 participating in, or denied him the benefits of, the University's services,
13 programs, or activities or the University otherwise discriminated
14 against him?

15 _____ YES _____ X NO "

16 (Verdict Form at Docket # 246)

17 The Court polled the jury, at the request of counsel for both sides, and then
18 discharged them. All counsel had the opportunity to talk to members of the jury after the
19 verdict.

20 On November 16, judgment was entered in favor of The Regents of the University of
21 California, The School of Law (Boalt Hall), and The University of California at Berkeley
22 against Antonio C. Simonelli.

23 MOTION FOR NEW TRIAL

24 Simonelli moves for a new trial on the grounds that:

- 25 1. The jury's verdict was against the clear weight of the evidence;
- 26 2. The admission of evidence as to allegedly alternative accommodations was
27 erroneous and prejudicial and harmful to Simonelli;
- 28 3. The testimony of Mark Lipian was erroneously admitted and prejudicial and

harmful to Simonelli;

4. The testimony of Angelika Leventhal was erroneously admitted as it could only be considered as expert testimony for which no proper pretrial disclosure was made;

5. The exclusion of evidence of partial interim settlements prevented Simonelli from presenting a complete picture of the case: the University was not merely a “bumbling bureaucracy,” but a recalcitrant institution, unwilling to honor its promises unless forced to; and

6. The testimony of Mark Lipian should have been stricken for violating the Court’s sequestration order.

Motion for New Trial - Standard

Rule 59(a) states, “A new trial may be granted ... in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.” Fed.R.Civ.P. 59(a)(1).FN4 As this circuit has noted, “ Rule 59 does not specify the grounds on which a motion for a new trial may be granted.” *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir.2003). Rather, the court is “bound by those grounds that have been historically recognized.” *Id.* Historically recognized grounds include, but are not limited to, claims “that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving.” *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). The Ninth Circuit has held that “[t]he trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice.” *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 510 n. 15 (9th Cir.2000). *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir.2007)

Upon the Rule 59 motion of the party against whom a verdict has been returned, the district court has “the duty ... to weigh the evidence as [the court] saw it, and to set aside the verdict of the jury, even though supported by substantial evidence, where, in [the court's] conscientious opinion, the verdict is contrary to the clear weight of the evidence.”

1 *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir.1990) (quoting *Moist Cold*
2 *Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246, 256 (9th Cir.1957)). (cited in *Molski*,
3 481 F.3d at 729.)

4 An appellate court generally will not reverse the denial of a new trial motion if there
5 was some “reasonable basis” for the jury's verdict. If there is no reasonable basis, however,
6 “the absolute absence of evidence to support the jury's verdict makes [refusal to grant a
7 new trial] an error in law.” *Molski*, 481 F.3d at 729 (internal citations omitted).

8 To prevail on a Title III discrimination claim, the plaintiff must show that (1) he is
9 disabled within the meaning of the ADA; (2) the defendant is a private entity that owns,
10 leases, or operates a place of public accommodation; and (3) the plaintiff was denied public
11 accommodations by the defendant because of his disability. 42 U.S.C. §§ 12182(a)-(b).

12 **The weight of the evidence supports the jury’s verdict**

13 The Court may grant a new trial only if “the verdict is contrary to the *clear weight* of
14 the evidence, or is based upon evidence which is false, or to prevent, in the sound
15 discretion of the trial court, a miscarriage of justice.” *Silver Sage Partners, Ltd. V. City of*
16 *Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001) (emphasis added). The Court may
17 not grant a new trial merely because the trial court would have arrived at a different verdict.
18 *Wallace v. City of San Diego*, 479 F.3d 616, 630 (9th Cir. 2007), but only if, after giving full
19 respect to the jury’s findings, the judge “is left with the definite and firm conviction that a
20 *mistake has been committed* by the jury.” *Landes Const. Co., Inc. V. Royal Bank of*
21 *Canada*, 833 F.2d 1365, 1371-72 (9th Cir. 1987).

22 The clear weight of the evidence at the trial of this case supports the jury’s verdict
23 that the University did not discriminate against Simonelli by excluding him from participating
24 in the University’s programs. To the contrary, the evidence showed that the University bent
25 over backward for Simonelli: Holly Parrish worked hard to accommodate him; Professor
26 Berring, John Steele, and Amy Guzman attempted to assist him in various ways with his
27 accommodations and demands. The University provided Simonelli with
28 training in electronic technology, allowed him to take his exams at home with triple time and
one week between exams, hired professional note takers, allowed him to take a reduced

1 course load, offered him books on tape and four-track tape machines, offered him
2 electronic adaptive technology, provided him books on disk, offered him use of Closed
3 Circuit Television, and paid for professional readers.

4 The Disabled Student Program ("DSP") worked hard to encourage Simonelli to be
5 independent and to succeed both during and after law school, even creating a "mini
6 production facility" to facilitate copying Simonelli's course materials. The DSP worked with
7 the law school, with Boalt Hall Copy Center, and with Copy Central to address Simonelli's
8 requests. The personnel from the DSP, many of whom were disabled themselves, were
9 personally and professionally committed to doing everything possible to assist a disabled
10 student, which they did for Simonelli. The University spent approximately \$160,000
11 providing Simonelli with enlarged text reading materials for his law school classes. DSP
12 has never before or since, spent this much money (or time, probably) on one student.

13 At trial Simonelli presented evidence of alleged delays which turned out not to be
14 what he represented. For example, he claimed that the University delayed for months
15 providing him with enlarged text materials for his Legal Professions class. However, Holly
16 Parrish testified that she produced the materials on time, but that Simonelli complained
17 they were not to his exact specifications.

18 The evidence was overwhelming that the University offered Simonelli reasonable
19 accommodations, tailored to his individual needs, to enable him to participate fully in his
20 law school classes.

21 Evidence of alternative accommodations was admissible

22 Defendants distinguish the cases Simonelli cites against admission of evidence of
23 alternative accommodations. Simonelli relies on *Mantoletto v. Bolger*, 767 F.2d 1416 (9th
24 Cir. 1985), in which an employer claimed it was not possible to accommodate an employee,
25 not the case here; and *Borkowski v. Valley Central School, Dist.*, 63 F.3d 131 (2d Cir.
26 1995), where the defendant claimed an undue hardship defense, which the Defendants in
27 this case expressly disavowed.

28 The controlling case is *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001),
cited both by Defendants and Simonelli. In that case the court held that a public entity

1 “acts” when it investigates reasonable accommodations and offers them based on that
2 investigation and not on stereotyped assumptions of what disabled students need. This is
3 what happened here. Simonelli had successfully used certain accommodations as an
4 undergraduate at UC Berkeley. Based on this specific information about Simonelli himself,
5 and on DSP’s expertise in providing such accommodations for about 10,000 students over
6 the course of 25 years, Defendants offered those same previously successful
7 accommodations, as well as others. The only question for the jury to answer, if it got that
8 far, was whether the University’s acts were so unfair as to constitute “deliberate
9 indifference” or some other type of intentional discrimination. Excluding this information
10 would have been unfair and contrary to law. The Court correctly declined to exclude
11 evidence of alternative accommodations.

12 **Testimony of Angelika Leventhal as a percipient witness is admissible**

13 Simonelli objected to Angelika Leventhal as an undisclosed expert. She evaluated
14 Simonelli on behalf of the California Department of Rehabilitation to discern what
15 accommodations would be best for him. A lay witness, like Leventhal, is generally
16 precluded from expressing an opinion on matters that are beyond the realm of common
17 experience and which require the special skill and knowledge of an expert witness.
18 However, when such testimony is based on *personal knowledge* and susceptible to cross-
19 examination, it is admissible.

20 Leventhal testified as a percipient witness, to matters within her personal knowledge.
21 The Department of Rehabilitation hired her to perform an adaptive technology evaluation of
22 Simonelli and she testified only about the tests she performed and the conclusions she
23 reached at the time she administered the tests. She did not testify as to her opinion based
24 on a hypothetical situation, but that, in effect, “I administered those tests and concluded
25 that those accommodations worked.”

26 Simonelli complained of not being able to depose Leventhal. In fact, Defendants had
27 disclosed Leventhal as a witness nearly six months before trial but Simonelli made no effort
28 to depose her or acquire any additional information about her until the week before trial.
Defendants provided Simonelli’s counsel with her contact information upon request, but

1 Simonelli's attorney's office had already contacted her prior to receiving that information
2 from Defendants.

3 The Court properly admitted Angelika Leventhal's testimony.

4 **Dr. Mark Lipian's testimony on malingering was admissible**

5 Based on an eight-hour examination of Simonelli and review of 48 categories of
6 documents, Dr. Lipian, a forensic psychiatrist, rendered two opinions:

- 7 1. Simonelli did not suffer any clinically significant emotional distress from
8 anything Defendants did or did not do; and
- 9 2 The emotional distress, if any, that Simonelli suffered from his injuries in the
10 car accident, is being misattributed to his experience at Boalt in such a way
11 that it implicates the DSM-IV's definition of "malingering."

12 Defendants distinguish the *Nichols* decision, on which Simonelli relies. In that case,
13 the defendant's expert testified that the plaintiff "had poor psychiatric credibility." The court
14 held this was not a proper subject for an expert because the expert offered a psychological
15 label for what was in fact her evaluation of the truth of the plaintiff's statements. *Nichols v.*
16 *American Nat'l. Ins. Co.*, 154 F.3d 875, 884-885 (8th Cir. 1998).

17 In this case, Dr. Lipian testified not on Simonelli's credibility, but on Simonelli's claim
18 that he suffered clinically significant emotional distress from his law school experience. Dr.
19 Lipian testified that this is psychiatrically improbable or impossible. Courts routinely admit
20 testimony on malingering. *U.S. v. O'Kennard*, 201 Fed. Appx. 369, 370 (7th Cir. 2006);
21 *Strickland v. U.S.*, 316 F.2d 656 (D.C. Cir. 1963); *James v. Tighlman*, 194 F.R.D. 408
22 (D.Conn.1999). Dr. Lipian has testified as an expert on the subject of malingering in
23 approximately 10 trials and his testimony has never been limited or excluded. (Lipian Decl.,
24 Ex. 1 to Def. Opp. to Mot. for New Trial).

25 The Court properly admitted Dr. Lipian's testimony.

26
27 **Dr. Lipian's review of portions of trial transcript was not grounds to strike his**
28 **testimony**

1 Simonelli moved to strike Dr. Lipian's trial testimony on the grounds that he violated
2 the Court's order sequestering witnesses. Dr. Lipian testified that he reviewed a partial
3 transcript of the testimony of Simonelli and of Simonelli's treating psychiatrist and testifying
4 expert, Dr. Lenore Terr. There was no express exception to the sequestration order for
5 expert witnesses. Defendants contend that there was also no explicit order that prohibited
6 an expert witness from reviewing any of the trial transcript. Dr. Lipian read three pages of
7 one daily transcript of Simonelli's and Dr. Terr's testimony.

8 The purpose of the sequestration rule is to prevent the shaping of the testimony of
9 one witness to match that of another, and to discourage fabrication and collusion. *Taylor v.*
10 *U.S.*, 388 F.2d 786 (9th Cir. 1967). Dr. Lipian reviewed testimony by Simonelli about
11 statements he had already made to Dr. Lipian regarding having pain at night and about
12 what he did or did not report to Dr. Terr. (Ex. 3 to Def. Opp. to Mot. For New Trial)
13 Furthermore, Simonelli fails to show how he was prejudiced by Dr. Lipian's review of this
14 testimony. *U.S. v Lamp*, 779 F.2d 1088, 1086 (5th Cir. 1986) (no merit to contention that
15 witness's testimony should be excluded due to violation of sequestration order, without
16 showing of prejudice.)

17 The Ninth Circuit reviews a decision whether to permit a witness to testify after an
18 alleged violation of a sequestration order, for abuse of discretion, looking to the nature and
19 effect of the violation. Disqualification is "strongly disfavored." *U.S. v. English*, 92 F.3d 909,
20 913 (9th Cir.1996). This Court must also consider whether the alleged violation of the
21 sequestration order by Defendants was intentional and whether there was prejudice to the
22 objecting party. *Id.*

23 Simonelli fails to present any evidence that Dr. Lipian deliberately violated the
24 Court's order, altered his testimony as a result of reading the transcripts, or that his having
25 read the transcripts prejudiced Simonelli.
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1 Experts are generally permitted to consider trial testimony in rendering their
2 opinions. Dr. Lipian was subject to unrestricted cross examination. Had defense counsel
3 sought on exception to the exclusionary order for Dr. Lipian, the Court would have granted
4 it.

5 This Court properly declined to strike Dr. Lipian's testimony.

6 **The Court properly excluded evidence of partial settlements**

7 Evidence of an offer or acceptance of an offer to compromise a disputed claim is not
8 admissible to provide liability for or invalidity of a claim or its amount. FRE 408(a). Nor is
9 evidence of conduct or statements made in the course of compromise negotiations
10 admissible. FRE 408(a)(2). This is to encourage the free discussion of possible resolutions
11 of a dispute without litigation. Parties frequently offer to settle, even where they deny
12 liability, as here.

13 In fact, this court's ADR Local Rules codify the policy of maintaining confidentiality of
14 settlement discussions. ADR Local Rule 7-5 provides that the court, the settlement judge,
15 all counsel and all parties shall maintain the confidentiality of written settlement conference
16 statements and anything said or that happens in connection with a settlement conference.
17 Further, this information may not be used "for any purpose , including impeachment, in any
18 pending or future proceeding in this court." ADR Local Rule 7-4.

19 Simonelli objects to the Court's excluding evidence of the partial settlements in this
20 case. He concedes that Federal Rule of Evidence 408 limits the prohibition on using
21 settlements to prove liability but notes that it also permits evidence of settlement
22 agreements for other purposes. *Brocklesby v. United States*, 767 F.2d 1288, 1292-93 (9th
23 Cir. 1985). In fact, FRE 408 expressly provides for the following exception: "This rule ...
24 does not require exclusion when the evidence is offered for another purpose, such as
25 proving bias or prejudice of a witness...." *Id.* at 1292.

26 Courts have admitted evidence of offers or agreements to compromise for purposes
27 of rebuttal, for purposes of impeachment, to show the defendant's knowledge and intent, to
28 show a continuing course of reckless conduct, to negate the defense of mistake, and to
prove estoppel. *Bankcard America, Inc. v. Universal Bancard Systems, Inc.*, 203

1 F.3d 477, 484 (7th Cir. 2000) (holding that use of FRE 408 to block evidence that the
2 violation of the contract was invited would be unfair, and outweighed the potential for
3 discouraging future settlements.) *Id.*

4 Simonelli contends that Federal Rule of Evidence 83, that local rules must be
5 consistent with the Federal Rules, trumps the University's reliance on this Court's
6 Alternative Dispute Resolution Local Rule 7-5.

7 Simonelli proffered the University's agreement to employ Copy Central to do the
8 copying as a result of settlement negotiations, not to establish liability, but to show why the
9 University began to use Copy Central. He contends that the University was able to benefit
10 unfairly by presenting this as evidence of its bending over backward to accommodate
11 Simonelli. However, he contends, if the evidence had been presented in context, the jury
12 would have understood that the University only went to Copy Central after the pressure of
13 settlement negotiations. Simonelli cites *Brady v. Wal-Mart Stores, Inc.*, 455 F.Supp.2d 157,
14 179-182 (E.D.N.Y. 2006), where the district court admitted the terms of a consent decree to
15 rebut claims of good-faith and compliance with defendant's ADA obligations—the very use
16 for which Simonelli contends evidence of the settlements is relevant in this case.

17 Defendants object to what they contend was Simonelli's attempt to bias the jury
18 against Defendants by leading the jury to infer an admission of liability on their part.
19 Defendants argue that it is not relevant why Defendants started using Copy Central
20 because Simonelli admits there were no delays at that point in his receiving his materials. If
21 Simonelli intended to show that the University's earlier failure to use Copy Central was a
22 "reckless disregard of its accommodation obligations," he could have demonstrated that
23 without reference to the settlement agreements.

24 Defendants contend that even if there were some probative value to admit
25 references to the parties' settlement negotiations, that would be outweighed by the risks of
26 prejudice and confusion. See FRE 403; *Williams v. Chevron USA*, 875 F.2d 501, 504 (5th
27 Cir. 1989) (exclusion of evidence offered for impeachment purposes not an abuse of
28 discretion when it was "possible that the jury would have confused its purpose for that
precluded by Rule 408").

1 In the case at bar not only might the jury have inferred liability, but the trial could
2 have been sidetracked into explanations of the three years of settlement negotiations, and
3 debates over what was and was not decided. Simonelli's attorney, Mr. Katzenbach, was
4 present during the negotiations and therefore a witness to the settlements. Admission of
5 the settlements might have led to "a rash of motions for disqualification of a party's chosen
6 counsel who would likely become a witness at trial." Adv. Comm. Notes to 2006
7 Amendments to FRE 408 (internal quotes admitted). Admission of evidence of the
8 settlements could have backfired on Simonelli.

9 This Court concludes that the evidence of the partial settlements in this case was
10 properly excluded, in light of the requirement of confidentiality for settlement discussions, in
11 both the Federal Rules of Evidence and the ADR Local Rules. Whatever probative value
12 such evidence might have had would have been outweighed by potential prejudice to
13 Defendants and possibly even to Simonelli, and would have had a strong likelihood of
14 confusing the jury. Evidence of the settlement discussions would likely have led the jury to
15 conclude that Defendants had admitted liability by agreeing to provide Simonelli with some
16 of his requests - - exactly the result which Rule 408 seeks to prevent.

17 **Conclusion on Motion for New Trial**

18 Accordingly, for all the above reasons, the Court denies Simonelli's motion for a
19 new trial.

20 **MOTION FOR ATTORNEY'S FEES**

21 Simonelli moves for an award of attorney fees, pursuant to Rule 54(d) of the Federal
22 Rules of Civil Procedure and the Americans with Disabilities Act, 42 U.S.C. §12205 and the
23 Rehabilitation Act of 1973, 29 U.S.C. §794(a)(b). He seeks an award for 163.7 hours by Mr.
24 Katzenbach at \$250 per hour and 0.6 hours for Ms. Hancock at \$150 per hour, during the
25 period from the beginning of this case until Simonelli's graduation from law school in May
26 2005, for a total of \$40,865. He also requests \$622.40 for expenses incurred during the
27 same period.

28 Attorney Katzenbach has 30 years' experience in employment and labor law and
litigation, in government (Enforcement Division, Appellate Court Branch, NLRB) and private
practice. He received his B.A. degree in 1973 from Stanford University and his J.D. in 1976

1 from Yale Law School. He is the member of numerous state and federal bars, including the
2 Northern District, the U.S. Court of Appeals for the Ninth Circuit and the U.S. Supreme
3 Court. In his motion Katzenbach describes a number of cases in which he received awards
4 at hourly rates as high as \$350 per hour, for trial and appellate work. *McBride v. PLM*
5 *International*, C-95-2818 CW (decision on appeal at 179 F.3d 737 (9th Cir. 1999).

6 Ms. Hancock was admitted to the California bar in 1999. She received her B.A. from
7 UC Berkeley in 1988 and her J.D. from Boalt Hall in 1999. She was an associate at
8 Pillsbury Winthrop, before joining Katzenbach and Khtikian in 2003, and has since
9 specialized in labor and employment litigation.

10 **Simonelli's counsel did not meet and confer**

11 Defendants note that Simonelli did not prevail on summary judgment or at trial; his
12 sole basis for a fee award is the partial settlements the parties arrived at in 2002 and 2004.

13 Preliminarily, Defendants ask this Court to deny Simonelli's motion, not only
14 because he is not a prevailing party, but also because he failed to meet and confer, as
15 required by Northern District Local Rule 54-6(a), which provides:

16 Counsel for the respective parties must meet and confer for the purpose of resolving
17 all disputed issues relating to attorney's fees before making a motion for award of
18 attorney's fees.

19 If the moving party makes a good faith effort to arrange a conference, but none is
20 held, then counsel must file a declaration certifying counsel's good faith effort and why the
21 conference was not held. (NDLR 54-6(b))

22 Simonelli's counsel in his declaration in support of his motion for fees offers his
23 excuse for not attempting to arrange a conference: Defendants only offered \$10,000 in fees
24 at a settlement conference in September 2007, two months before the start of trial.
25 Consequently, he "did not seek further discussions in connection with this motion as such
26 discussions post-trial seemed pointless."
27
28

Defendants contend fees are unreasonable

Finally, Defendants reject the amount of fees requested as unreasonable - - they contend that Simonelli, even if he could recover, should not be awarded fees for work on unsuccessful motions or on issues not resolved by any settlement, or for time spent after the August 2004 settlement conference. Defendants contend he should receive only \$22,328.40, if anything.

Because the Court finds that Simonelli is not a prevailing party, it does not assess the reasonableness of the fee request. The Court agrees that Simonelli did not make a concerted effort to resolve the fee issue before filing a motion but disregards this requirement in order to decide the question on the merits.

The terms of the agreements

Simonelli alleges that he is a partially prevailing party by reason of the partial settlement agreements the parties recorded before Magistrate Judge Maria-Elena James, which ensured that he would receive timely enlarged print materials for the remainder of his law school studies. Specifically he contends that the settlement agreement entered into by the parties before Judge James ensured that the University, through an arrangement with Copy Central, would provide him with timely enlarged text materials for his law school classes.

There are two agreements - - the first was reached on August 14, 2002 and the second August 5, 2004. The August 14, 2002 agreement is at Exhibit 4 to the Declaration of Marcie Isom in Opposition to Plaintiff's motion for attorney's fees.

Defendants argue that Simonelli has not prevailed on anything in this lawsuit - - Judge Breyer denied his first motion for a temporary restraining order and referred the parties to Magistrate Judge James for a settlement conference. After a series of meetings with Judge James, the parties eventually reached an agreement which Simonelli asserts as the basis for his fee claim. However, Simonelli subsequently refused to sign off on the written version of their agreement and Judge James stated on the record on August 14, 2002, at the initial conference, that it was "not really a binding agreement." (Exhibit 4 to Isom Declaration).

1 The parties endorsed what Judge James described as “a tentative agreement at
2 this point,” and Mr. Katzenbach referred to it as “an interim solution that will take us through
3 the fall semester of 2002, which will involve Mr. Simonelli taking three exams for courses
4 which he has already taken, but has not taken the final exams.” The parties further agreed
5 that Mr. Simonelli would complete the three exams during the fall semester, no later than
6 January 9, 2003 and enroll in two Law School courses during the Fall 2002, and take and
7 complete the final exams for those courses during the fall semester 2002, during final exam
8 week, no later than December 20, 2002. If the University did not require Simonelli to take
9 the two exams during that time, he agreed to waive his rights to a one-week time-off period
10 between exams, a reasonable accommodation which had been offered to him by the
11 University.

12 The purpose of the agreement, according to Simonelli’s counsel, was “to assess
13 whether or not it is feasible for Mr. Simonelli to proceed with his law school education in this
14 case.”

15 The University agreed, “without waiving any rights or defenses available to it, [to]
16 provide to Mr. Simonelli for those three exams and for the two courses, all of the
17 compulsory reading material in 32 point type, separately paginated, spiral bound, in a
18 timely manner.”

19 Defense counsel assented to Simonelli’s counsel’s recitation of their agreement. (*Id.*
20 at 3:14-5:22, 6:20)

21 It is this agreement which Judge James characterized, “And this isn’t really a
22 binding agreement.” (*Id.* at 6:21-22)

23 The agreement provided that:

- 24 • Simonelli would reduce his course load and take make-up
25 examinations for classes he had already taken;
- 26 • Simonelli would arrange his schedule to be on track to graduate in Fall
27 2004;
- 28 • The University would continue to provide Simonelli with enlarged-print
text for his classes. (*Id.*)

1 Magistrate Judge James between December 12, 2002 and July 30, 2003, also
2 issued a series of ancillary orders related to the case but not incorporating the agreement,
3 including, that:

- 4 • Simonelli release his medical records to Defendants;
- 5 • Simonelli may not tape record the lectures in his Torts class;
- 6 • Simonelli may transfer Torts classes, but must be responsible for
7 arranging and paying for the copying and enlargement of materials (he
8 failed to transfer classes);
- 9 • Simonelli bring his Creditors' Rights book to Copy Central by a
10 specified date to be enlarged to 32 point font and that color paper
11 should be used as a divider between sections;
- 12 • Defendants give Simonelli notice of the time and place of the
13 independent medical examination;
- 14 • Simonelli contact the Court by a specific date to indicate if there are
15 any materials he has not received for Securities Regulations or Legal
16 professions;
- 17 • Simonelli submit to a low vision assessment;

18 (Exhibits 1 and 2 to Katzenbach's Declaration ISO Mot. for Attorney Fees are
19 documents reflecting the orders by Judge James and a transcript of the second on-the-
20 record agreement between the parties, memorialized in a memo from Defendants' former
21 counsel on December 3, 2004.) The proceedings themselves occurred August 5, 2004. It is
22 this agreement which Simonelli refused to sign. It provided that:

- 23 • Simonelli would not enroll in the Fall 2004 semester;
- 24 • By December 22, 2004, Simonelli would take make-up final
25 examinations in four classes;
- 26 • Simonelli would complete the requirements for the JD degree in Spring
27 2005. If he did not do so, Defendants would not permit him to re-enroll
28 or graduate from Boalt.

All parties agreed to be bound by these terms.

1 (Ex. 6 to Isom Declaration, letter to Katzenbach from former defense counsel Eric DeWalt)

2 **Simonelli is not a prevailing party**

3 Simonelli argues that as a result of these settlement negotiations he prevailed on a
4 significant issue in litigation which achieved some of the benefits he sought in bringing suit.
5 *Park v. Anaheim Union High School Dist.*, 464 F.3d 1025, 1034 (9th Cir. 2006) (internal
6 citations omitted). He also contends that he achieved a “material alteration of the legal
7 relationship of the parties.” *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. Of Health*
8 *& Human Res.*, 532 U.S. 598, 604 (2001). He characterizes the agreement the parties
9 reached after meeting with Judge James as “legally enforceable” and therefore a “judicially
10 sanctioned change in the legal relationship of the parties.” *Carbonell v. I.N.S.*, 429 F.3d
11 894, 901 (9th Cir. 2005).

12 The court of appeals in that case held that “a plaintiff who succeeds in obtaining a
13 court order incorporating an agreement that includes relief the plaintiff sought in the lawsuit
14 ... is a prevailing party for attorney's fees purposes.” *Carbonell v. I.N.S.* 429 F.3d 894, 901
15 (9th Cir. 2005) (citing *Labotest, Inc. v. Bonta*, 297 F.3d 892, at 893 (9th Cir. 2002)).

16 In the case at bar, Simonelli presumably bootstraps this theory onto orders by Judge
17 James which were related to the case and the parties' negotiations but did not by any
18 stretch of the imagination incorporate the agreement of the parties. *Carbonell* is completely
19 distinguishable from this case.

20 At the hearing on the motion, Simonelli's counsel emphasized Simonelli's reliance
21 on a decision which in fact seriously undermines his position - - the *P.N.* case, in which the
22 court of appeals affirmed the district court's decision that a parent, who settled her claim
23 against a school district via an agreement signed only by the parties, was not a prevailing
24 party for purposes of an award of attorney fees. The reason was that the agreement lacked
25 a judicial *imprimatur*, which that court interpreted literally as the judge's signature on the
26 agreement.

27 “*The conflict was resolved by a settlement agreement signed only by the parties.*
28 *The district court held that P.N. was not a prevailing party, and thus, not entitled to*
attorneys' fees under the IDEA because the settlement agreement lacked any
judicial imprimatur. We affirm.”

1 *P.N. v. Seattle School Dist. No. 1*, 474 F.3d 1165, 1167 (9th Cir. 2007)(citing
2 *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S.
3 598, 600 (Emphasis added).

4 In the case at bar, neither the settlement judge, Magistrate Judge James, nor the
5 trial judge at that time, Judge Breyer, signed off on the parties' agreement. In fact, neither
6 did Simonelli. Although this is not the sole indicator that the agreements were insufficient to
7 make Simonelli a prevailing party, the absence of any judge's signature most obviously
8 renders the agreements unenforceable and insufficient to transform Simonelli into a
9 prevailing party, even a partially prevailing party, to justify an award of attorney fees.

10 **Voluntary Acts by Defendants**

11 Procedural neglect aside, Simonelli cannot obtain an award of fees, because a
12 voluntary act by Defendants, without any change in the legal positions of the parties, and
13 without any judicially enforceable order or other "judicial imprimatur," cannot support an
14 award of fees. No defendant would ever voluntarily make any gesture of good will if that
15 automatically led to a fee penalty afterwards.

16 The controlling case is *Buckhannon Board and Care Home v. West Virginia Dept. Of*
17 *Health & Human Res.*, 532 U.S. 598 (2001). The Court held that "enforceable judgments on
18 the merits and court-ordered consent decrees create the 'material alteration of the legal
19 relationship of the parties' necessary to permit an award of attorney's fees." *Id.* at 604.

20 The Court found there was no justification for an award of fees merely because a
21 defendant agrees to something a plaintiff wanted. "A defendant's voluntary change in
22 conduct, although perhaps accomplishing what the plaintiff sought to achieve by the
23 lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus
24 counsel against holding that the term 'prevailing party' authorizes an award of attorney's
25 fees *without* a corresponding alteration in the legal relationship of the parties." *Id.* at 605
26 (Emphasis in original).

27 The majority expressly rejected the dissenter's suggestion that fees be awarded
28 where the plaintiff's claim "was at least colorable" and "not groundless." Rather, the majority
reiterated, "We cannot agree that the term 'prevailing party' authorizes federal courts to

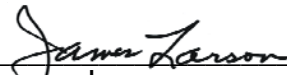
1 award attorney's fees to a plaintiff who, by simply filing a frivolous but nonetheless
2 potentially meritless lawsuit . . . has obtained any judicial relief." *Id.* The Court was referring
3 to a case which was dismissed as moot due to a change in the law before trial. However,
4 this policy consideration is even stronger in a case such as this one, where Simonelli's
5 lawsuit was rejected on the merits, by the Court on summary judgment, and by the jury,
6 after trial.

7 In this case there was no judicial imprimatur on the agreements between the parties,
8 by either Judge Breyer, the trial judge at the time they were made, or Magistrate Judge
9 James, the settlement judge. In fact, Simonelli himself failed to sign off on the 2004
10 agreement.

11 **Conclusion on Motion for Attorney's Fees**

12
13 For all the above reasons, the Court must deny Simonelli's motion for attorney fees.
14 IT IS SO ORDERED.

15
16 DATED: February 14, 2008

17
18 
19 _____
20 James Larson
21 Chief Magistrate Judge
22

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